IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

CRL.A.No. 2098 of 2005()

SC.38/2005 of ADDL. SESSIONS COURT (ADHOC) III, PALAKKAD
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APPELLANT: II ACCUSED

KUNHUMON @ RAGESH,
CONVICT NO.3881, CENTRAL PRISON,
VIYYUR.

BY ADV. ADV.N.K.SUBRAMANIAN(STATE BRIEF)

RESPONDENTS:

STATE, REP. BY EXCISE INSPECTOR,
EXCISE RANGE OFFICE, PALAKKAD IN CRIME NO.9/2002.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.A. No. 2098 of 2005

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Dated, this the 4th day of December 2006

ORDER

In this appeal preferred from the Central Prison, Viyyoor, the 2nd accused in S.C. 38/05 on the file of the Addl. Sessions Court, (Adhoc) Fast Track Court No. III, Palakkad, challenges the conviction entered and the sentence passed against him by that court for offences punishable under Sec. 8(2) and 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 19-3-2002 at 5.30 p.m. in the house bearing III/264 of Marutharoad Panchayath and belonging to the first accused, the 2nd accused persons were found in joint possession of 9 liters of arrack in a jerry can having a capacity of 10 liters. The accused have thereby committed the aforementioned offences.

3. On the accused persons pleading not guilty to the charge framed against them by the court below for offences punishable under Secs. 8(1) and 8(2) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 7 witnesses as P.Ws 1 to 7 and got marked 10 documents as Exts. P1 to P10 and one material object as MO1.

4. After the close of the prosecution evidence, the accused were questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution.

They denied those circumstances and maintained their innocence.

5. The learned Addl. Sessions Judge, after trial, as per judgment dated 9-11-2005 found both the accused guilty of the offences. For the conviction under Section 8(2) of the Abkari Act, the accused were each sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to undergo simple imprisonment for a further period of six months each. It is the said judgment which is assailed in this appeal by the 2nd accused.

6. I heard Advocate Sri. N.K. Subramanian, the learned counsel who defended the appellant on State Brief and Advocate Sri. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

P.W.1 was the Assistant Excise Inspector, Excise Range Office, Palakkad. He detected the offence. P.W.2 was a preventive officer who was in the company of P.W.1 on the date of detection. P.Ws 3 and 4 are the independent witnesses who were also the attestores to Ext.P1 mahazar prepared by P.W.1. They turned hostile to the prosecution. Exts. P4 and P5 are their case diary contradictions. P.W.5 was the Secretary of the Marutharoad grama panchayath. He proved Ext.P6 ownership certificate indicating that the house in question belongs to A1. P.W.6 was the Excise

Inspector who registered the case and filed Ext.P7 crime and occurrence report, conducted the investigation by questioning the witnesses and submitting the original of Ext.P8 forwarding note requesting the sample to be forwarded to the chemical examiner for analysis. P.W. 7 was the Excise Inspector who laid the charge. Ext.P9 Chemical examination report was marked through him.

9. What is unravelled by the prosecution evidence is the following:-

P.W.1 who was the Assistant Excise Inspector attached to Palakkad Excise Range Office was proceeding on patrol duty on 19-3-2002. There was the Excise Preventive Officer (PW2) and three Excise Guards in his patrol party. After conducting patrol duty in Malampuzha village area such as Kottakkad etc. while proceeding to Padalikkad he got credible information to the effect that one Kunjan kutty , S/o. Ramankutty in Namballam Village near the Kottakkad temple was dealing with illicit arrack in his own house. He thereupon sent a search memo to court after recording his bonafide belief to the effect that there was the possibility of the contraband liquor being hastily removed in case the said house was not searched immediately. Thereupon the patrol party headed by P.W.1 proceeded to the said house. Seeing the excise party one person jumped out of the thatched house and escaped through the gap in the northern fence. Even though the excise party made an attempt to nab the said person, it was futile and he successfully made good his escape from there.

The excise party made enquiries about the person who ran away from the house and they were told that it was Kunhan Kutty (A1) S/o. Ramankutty. Then another person came out of the house. He was A2, the appellant herein. When interrogated, he told the excise party that he was a relative of A1 and he was residing at Arimboor in Thrissur Taluk. A search of the house resulted in the recovery of MO1 jerry can of 10 liter capacity containing about 9 liters of illicit arrack. After drawing a sample of 375 ml. in a bottle P.W.1 packed and sealed the sample bottle as well as the jerry can containing the balance quantity of illicit arrack. The contents of the can was identified to be arrack through smell and taste. Thereafter the 2nd accused was arrested and the contraband substances and the sample were seized under Ext.P1 mahazar prepared from the spot itself. P.Ws 3 and 4 who were the independent witnesses to the search and seizure affixed their signatures to Ext.P1 mahazar. Thereafter the 2nd accused, the contraband liquor, the sample and the seizure documents etc. were taken to the Excise Range Office, Palakkad from where P.W.6 the Excise Inspector received the same and registered a case as C.R. 9/02 of Palakkad Range. The accused as well as M.O.1 and the sample bottle together with the seizure documents including Ext.P1 were produced before the J.F.C.M. -III, Palakkad on the very next day, that is, on 20-3-2002. There they were received as item 125/2002 before the committal court which retained the sample bottle but returned the black jerry can containing the balance quantity of contraband liquor to the Excise Inspector for safe custody and for production before

court as and when required by the court. The sample bottle was dispatched from the committal court to the Chemical Examiner's laboratory. Ext.P9 is the report received by the committal court from the Assistant Chemical Examiner, Ernakulam to the effect that the sample bottle was received in a tamper proof condition and that the contents of the same when subjected to chemical examination was found to contain 21.35 percent by volume of Ethyl Alcohol.

10. The learned counsel defending the appellant on State Brief made the following submissions in support of his fervent plea for acquittal of the appellant:-

MO1 jerry can produced in court on 13-9-2005 was an empty can without its contents. There was no label or seal on MO1. The prosecution had a duty to prove that MO1 jerry can allegedly seized from the appellant was still containing the contraband liquor and that it was from this can that the sample was drawn. There is no evidence to this effect. The house from which the contraband liquor was seized admittedly belongs to A1 and not to the appellant. According to the appellant he was not in the said house and even if the prosecution case that he was arrested from the said house is true that does not connect with him with the offence. Both the independent witnesses examined as P.Ws 3 and 4 had turned hostile to the prosecution.

11. I am afraid that I cannot agree with the above submissions. Independent mahazar witnesses turning hostile to the prosecution is not a novel phenomenan unknown to criminal courts. Mahazar witnesses turning

hostile to the prosecution while examined before court is familiar to criminal courts and has been taken judicial notice of in various decisions. See for instance **Sivaraman v. State of Kerala - 1981 KLT (SN) 9.** In this case, both P.Ws 3 and 4 had admitted their signatures in P1 mahazar. It was thereafter that they were turning out to be cunning performers in the witness box evidently to jettison the appellant from his criminal liability. In the face of the credible testimony of P.Ws 1 and 2 the disloyalty exhibited by P.Ws 3 and 4 need not deter the court from arriving at the right conclusion.

12. The evidence of P.Ws 1 and 2 has been very inspiring and both of them gave a credible account of what transpired at the scene of crime. The appellant claims to be hailing from Thrissur. He had an explanation for his presence in the house in question at Maruthamroad grama panchayath in Palakkad. He confessed to the detecting officer that he is a distant relative of A1 and that the contraband liquor was brought there by A1 and that himself and A1 were making preparations to sell the illicit arrack. That probably explains his presence in that house. No doubt, the house belongs to A1 who managed to escape from the house seeing the excise party. But in the case of A2 he was arrested from the very same house where the contraband liquor was seen kept. The appellant along with the contraband liquor were found in the house in question. P.W.1 had drawn a sample containing 375 ml. from the bulk quantity of liquor from the spot itself. He thereafter packed and sealed MO1 jerry can as well as the sample bottle separately. A contemporaneous mahazar was prepared from the site itself

narrating the entire detection, search and seizure. The material objects including the sample bottle were produced before the committal court on the very next day where they were received in the sealed condition itself as can be seen from the property list. There is an endorsement on the property list to the effect that after retaining the sample bottle the jerry can containing the balance arrack was entrusted with the Excise Inspector with a direction to produce the same as and when called for. It was this sample bottle had been was retained in the court that was forwarded to the chemical examiner. Merely because the jerry can which was produced back in court on 30-9-2005 on the eve of the commencement of the trial does not contain any contraband arrack, it does not follow that the prosecution case in this regard is false. While producing MO1 in court the Excise Inspector had submitted a report to the effect that as a result of long storage the plastic can had broken and the entire contents had leaked out. There is no reason to disbelieve the said report of the excise inspector. Even if MO1 can before court does not contain any contraband liquor, there is the credible evidence of P.Ws 1 and 2 amply corroborated by Ext.P1 contemporaneous mahazar prepared from the spot itself to the effect that at the time of seizing the contraband liquor a sample was drawn from the same and that it was this sample which was retained by the court and forwarded to the chemical examiner who sent Ext,P9 report to the effect that the sample contained 21.35 percent by volume of Ethyl Alcohol.

13. It is not necessary to prove the ownership of the house. If

possession of the contraband liquor can be attributed to the appellant that is enough for recording a conviction under Sec. 8 (2) of the Act. Therefore, I do not find any good reason to interfere with the conviction entered against the appellant.

14. Sentence imposed on the appellant also cannot be excessive or disproportionately harsh having regard to the nature of the offence and the deleterious effect of contraband liquor on the human system. Even after the total ban of arrack in this State the accused was found in possession of 9 liters of illicitly distilled arrack. It is the gullible public who fall easy prey to this obnoxious drink which has an addicting tendency. This drink has destroyed so many families. Considering these aspects of the matter the sentence imposed on the appellant quite condign and well deserved.

In the result this appeal fails and is dismissed confirming the conviction entered and sentence passed against the appellant.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.

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Crl.A. No. 2098 of 2005

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Dated, this the 4th day of December 2006

ORDER